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Libel--Newspapers--A New First Amendment Safeguard

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LIBEL — NEWSPAPERS — A NEW FIRST AMENDMENT SAFEGUARD

New York Times Co. v. Sullivan, 376 U. S. 254 (1964).

Respondent Sullivan, Commissioner of Public Affairs for Montgomery County, Alabama, instituted a civil libel action against the New York Times Company. The action arose out of a full page advertisement entitled "Heed Their Voices" which appeared in the New York Times on March 29, 1960. The respondent alleged that the language in the advertisement accused him of sanctioning illegal anti-negro activities.[1] Although respondent Sullivan's name was not specifically mentioned in the advertisement, he claimed that all of the alleged acts could be imputed to him by the members of his constituency. Sullivan received a $500,000 verdict in the Alabama state court.

Upon affirmation of that decision by the Supreme Court of Alabama,[2] the New York Times Company appealed to the Supreme Court of the United States. The issue decided there is best expressed by Justice Brennan in the opening paragraph of the Court's opinion:

> We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.[3]

With respect to this issue the Court, in reversing the Alabama court, held that "what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[4] The Court reasoned that the threat of substantial damages in civil libel actions could be, in some instances, an even greater restraint on free speech than the threat of criminal prosecution. The Court concluded, therefore, that the Constitution protects comment on the official acts of

1. N. Y. Times, March 29, 1960, § L, p. 6, cols. 1-3. The pertinent part of the advertisement read as follows:

> After students sang . . . on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the . . . campus. When the entire student body protested to state authorities . . . their dining hall was padlocked in an attempt to starve them into submission.

The advertisement went on to state that Dr. Martin Luther King's house had been bombed with police sanction, and that Dr. King had been arrested by police seven times on "trumped up charges."

In reality, the students had not been expelled for the reasons stated in the advertisement, and the dining hall had not been padlocked. Although police did come in large numbers, they did not "ring" the campus or come because of the demonstration on the capitol steps. Also, Dr. King had in fact been arrested only four times, three of which took place before the respondent became Commissioner.

2. New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962), *cert. granted*, 371 U.S. 946 (1963).

3. New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

4. *Id.* at 277.

public officials. However, the Court noted that if the plaintiff-official can prove that his critics were guilty of actual malice, the first amendment protection does not apply. Hence malice cannot be inferred from the falsity of the statements, but must be proved to have actually existed in the mind of the critic at the time the statement was printed.[5]

In addition to requiring a showing of malice toward a public official a requisite to recovery, the *Sullivan* case has a far-reaching impact on state civil libel laws. In this respect, the case serves to clear up a great deal of confusion in the area of free comment and qualified privilege.[6] Prior to the Supreme Court's pronouncement in *Sullivan,* a majority of American jurisdictions recognized a distinct difference between free comment and qualified privilege. The leading case which provides the basis for the majority view in America is *Parmiter v. Coupland,*[7] wherein the court said:

> There certainly is a material distinction between a publication relating to a public and private person, whether they be libels. That criticism

5. *Id.* at 279-80. Justices Black and Goldberg, in concurring, would have gone even farther in order to protect statements which were made out of actual malice. Justice Goldberg stated:

> [I]t may be urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however is not responsive to the real issue presented by this case, which is whether . . . freedom of speech . . . can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. . . . *Id.* at 300.

He further argues that only by an absolute privilege to comment upon public officials in their official capacity can we insure that public debate will not be restrained.

6. Prosser describes qualified privilege as

> a group of situations in which the interest which the defendant is seeking to vindicate is regarded as having an intermediate degree of importance, so that the immunity conferred is not absolute, but is conditional upon publication in a reasonable manner and for a proper purpose. The privilege is therefore spoken of as 'qualified,' 'conditional,' or 'defeasible.' It is difficult to reduce these cases to any single statement and perhaps no better formula can be offered than that of Baron Parke, that the publication is privileged when it is 'fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. PROSSER, TORTS § 95, at 614 (1955).

Free comment according to Prosser is a type of qualified privilege. He describes free (or fair) comment in the following manner.

> Since it obviously is to the interest of the public that information be made available as to what takes place in public affairs, a qualified privilege is recognized under which a newspaper or anyone else may make such a request to the public. The privilege rests upon the idea that any member of the public, if he were present, might see for himself, and the reporter is merely a substitute for the public eye. PROSSER, *op. cit. supra* at 623.
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> But the report must be a fair and accurate one, and the privilege does not cover false statements of fact as to what has occurred, or mistakes in the names of parties, or the interpolation of defamatory matter, or a one sided account. . . . There is no privilege attached to the report as such to add comment, or headlines which do not fairly reflect the gist of the text, unless such comment is itself privileged because the subject of the proceedings affects the public interest. PROSSER, *op. cit. supra* at 625.

Of course, Prosser's descriptions of the elements of qualified privilege and free comment are pre-*Sullivan.*

7. 6 M. & W. 105, 151 Eng. Rep. 340 (1840).

> may reasonably be applied to a public man in a private capacity which might be applied to a private individual. The same thing might be no libel on me, which might be . . . on another.[8]

Although the majority of courts in this country do recognize a distinction between free comment and qualified privilege, this distinction is often hopelessly confused. The confusion has been greatly augmented by the courts' favoring the minority view. For example, in *Washington Times Co. v. Bonner*[9] the court, in expressing in part what it believed was the majority viewpoint, stated:

> The courts in a few states hold that the right of fair comment on matters of public interest extends, in the absence of malice, to misstatements of fact. . . . The theory underlying that view seems to be that free press discussion of matters of public interest is so important to the public that there should be no restriction upon newspaper statements except good faith in making them, *i.e.*, honest belief in their truth. . . . *But the great weight of authority in the state courts, and the rule in the federal courts, is to the contrary — that the right of fair comment does not extend to misstatements of fact.*[10]

Here the court treated qualified privilege as part of free comment. In reality they were two separate legal concepts. Free comment, contrary to the court in *Bonner*, extended only to criticism — not to facts.

In the midst of all this confusion, Justice Holmes, in *Burt v. Advertiser Newspaper Co.*,[11] had no difficulty in distinguishing free comment and qualified privilege. He stated:

> But there is an important distinction . . . between . . . privilege of fair criticism upon matters of public interest [*i.e.*, fair comment], and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant [*i.e.*, qualified privilege]. In the latter case, a *bona fide* statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged . . . is criticism, not statement. . . .[12]

Thus where the right to speak must be protected, as in the case of an employer discussing the abilities of his former employee, there is a privilege to misstate the facts. But such an employer has no immunity from civil liability unless he made the statements in good faith. If the privilege were absolute, such as the privilege extended to a judge in his court room or to a member of Congress on the congressional floor, there would be no liability to the employer even though he acted maliciously. Hence, the employer's privilege is a qualified privilege as opposed to the absolute one extended to judges and members of Congress. In commenting upon public officials, there is no privilege, be it qualified or absolute, to misstate

8. *Id.* at 108, 151 Eng. Rep. at 342 (concurring opinion).
9. 86 F.2d 836 (D.C. Cir. 1936).
10. *Id.* at 841-42. (Emphasis added).
11. 154 Mass. 238, 28 N.E. 1 (1891).
12. *Id.* at 242, 28 N.E. at 4.

facts with respect to the activities of the official. However, free comment permits the writer to *criticize* the public official with impunity. Thus *A* can write that *B*, a public official, is in *A*'s opinion, so incompetent that the country will be bankrupt in a few years. Even if *B* is highly skilled, he has no action against *A*. This is criticism of a public official which is protected by fair comment. But if *A* writes that *B* has just given a big contract to a company in which he has a personal interest, *A* would be liable to *B*, even though *A* fully believed the truth of the statement. However, *A* would, of course, not be liable to *B* if there were a qualified privilege; nevertheless, fair comment does not protect such a writing. Under the holding in the *Sullivan* case, qualified privilege is now extended to the hypothetical situation and *A* would not be liable for having falsely but innocently accused *B* of having a conflict of interest.

Prior to *Sullivan*, about eight states held that the right of fair comment extended to misstatements of fact made in good faith.[13] In other words, these states made no distinction between free comment and qualified privilege. For example, *Bailey v. Charleston Mail Ass'n*[14] supported the minority view — the view upheld in *Sullivan* — with the following rationale:

> In accordance with the better reasoned rule on the subject, we reach the conclusion that the official acts of a public officer are of such concern and importance to the public generally that a misstatement thereof is qualifiedly privileged if made in good faith and in a reasonable and honest belief that the statement is true. We restrict the rule as stated above to official acts done in the performance of a public officer's official duty.[15]

With respect to free comment and qualified privilege, the rule in Ohio was in accordance with that followed by a majority of states prior to *Sullivan*. The best example illustrating Ohio's position is expressed in *Post Publishing Co. v. Maloney*[16] wherein the court stated in its syllabus:

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13. See Washington Times Co. v. Bonner, *supra* note 9. See generally Annot., 110 A.L.R. 412 (1937), which explains the majority rule as follows:

> The theory underlying the majority rule is that while it is important that the public be informed of the character, qualifications, and conduct of public officers . . . so far as they are relevant, the extension of the doctrine of privilege to false statements of fact is not necessary to that end, and should not be permitted, in view of the grave consequences to the individual libeled. . . . *Id.* at 415.

At least twenty-nine states adhere to the majority rule. See, *e.g.*, Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919); Moore v. Booth Publishing Co., 216 Mich. 653, 185 N.W. 780 (1921); Foley v. Press Publishing Co., 226 App. Div. 535, 235 N.Y. Supp. 340 (1929); Tiepke v. Times Publishing Co., 20 R.I. 200, 37 Atl. 1031 (1897); Fort Worth Press Co. v. Davis, 96 S.W.2d 416 (Tex. Civ. App. 1936); Hanson v. Temple, 175 Wis. 349, 185 N.W. 225 (1921). At least eleven states follow the minority view. See, *e.g.*, Jones v. Express Publishing Co., 87 Cal. App. 246, 262 Pac. 78 (1927); Friedell v. Blakely Printing Co., 163 Minn. 226, 203 N.W. 974 (1925). For a further discussion of this problem see Annot., 150 A.L.R. 358 (1944).

14. 126 W. Va. 292, 27 S.E.2d 837 (1943).

15. *Id.* at 307, 27 S.E.2d at 844.

16. 50 Ohio St. 71, 33 N.E. 921 (1893).